

No. 86-934

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Supreme Court, U.S.  
FILED

FEB 5 1987

JOSEPH F. SPANIOL, JR.  
CLERK

**In the Supreme Court of the United States**

**OCTOBER TERM, 1986**

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**ROBERT T. PUSKARIC AND CHESTER JENKINS,  
PETITIONERS**

**v.**

**UNITED STATES OF AMERICA**

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**ON PETITION FOR WRITS OF CERTIORARI TO THE  
UNITED STATES COURT OF MILITARY APPEALS**

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**BRIEF FOR THE UNITED STATES**

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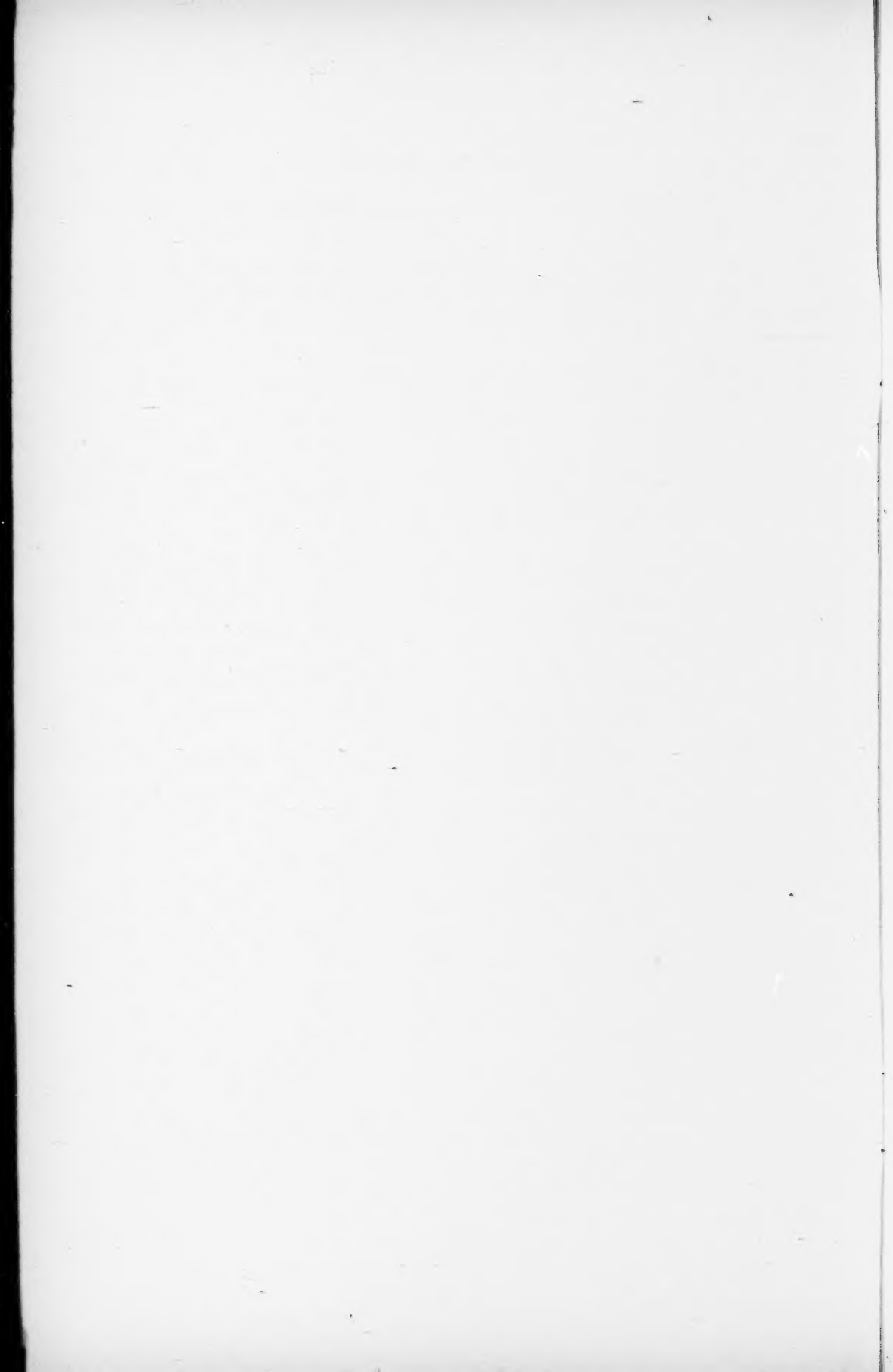
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### **QUESTION PRESENTED**

Whether the offenses committed by petitioners—sexual assaults on the dependent children of fellow servicemen—are sufficiently “service connected” to authorize a prosecution in the military system.



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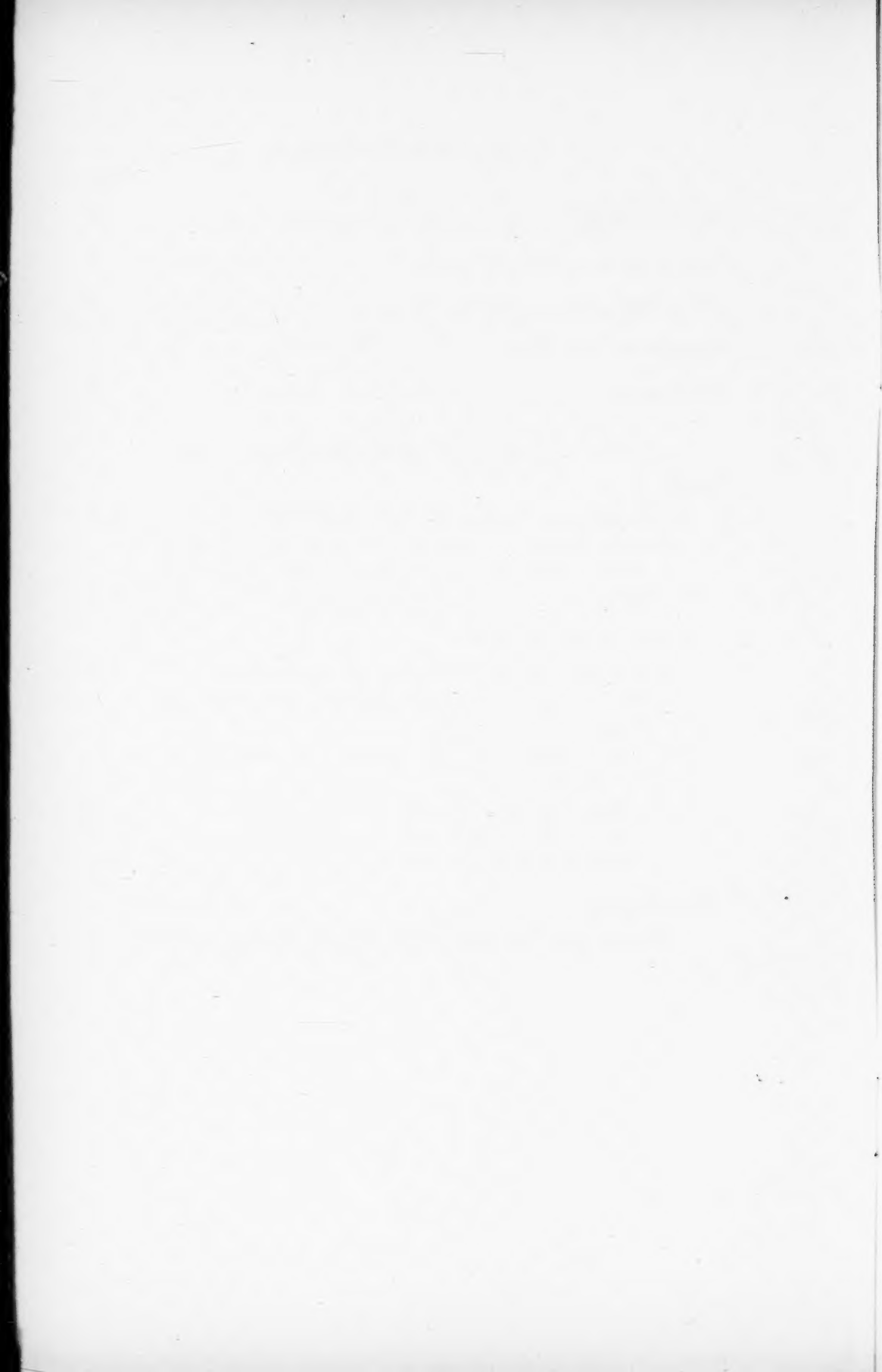
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**OPINIONS BELOW**

The orders of the Court of Military Appeals (Pet. App. 1a, 2a) are reported at 23 M.J. 178. The opinions of the Air Force Court of Military Review (Pet. App. 3a-4a, 5a-6a) are unreported.

**JURISDICTION**

The judgments of the Court of Military Appeals (Pet. App. 1a, 2a) were entered on October 9, 1986. The petition for a writ of certiorari was filed on December 8, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. (Supp. II) 1259(3).

## STATEMENT

1. Following a general court-martial before a military judge at Loring Air Force Base in Maine, petitioner Puskaric, a member of the United States Air Force, was convicted of two specifications of committing indecent acts against a minor, in violation of Article 134 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 934. He was sentenced to 24 months' confinement, a bad conduct discharge, forfeiture of \$100 pay per month for 24 months, and a reduction in rank to the lowest enlisted grade. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 3a-4a). The Court of Military Appeals affirmed (*id.* at 1a).

a. Petitioner Puskaric, his wife, and the father of the victim were all active duty members of the Air Force at the time of the crimes (Tr. 14). All three were stationed at Loring Air Force Base and were assigned to the same squadron. Puskaric's wife and the victim's father worked in the same office, and Puskaric worked in the same building (*id.* at 13-14, 32-33).

Puskaric first met the victim, Melanie Verberg, at her home on Loring Air Force Base, when Melanie and her mother were babysitting for Puskaric's infant son (Tr. 15, 25). Melanie, who was 10 years of age at the time of the assaults (*id.* at 59), became a friend of Puskaric's and occasionally visited his on-base residence. In April 1983 Melanie stayed overnight at the Puskarics' on-base residence to help the Puskarics paint (*id.* at 26). While Melanie was there, Puskaric twice sexually molested her (*id.* at 60-61, 62-63, 77-79, 85).

By the summer of 1983, Puskaric and his wife had separated and he had moved into an off-base apartment in Caribou, Maine, which is about six miles from Loring. Puskaric obtained permission from Melanie's mother to have Melanie come to his apartment for a weekend to help with his son (Tr. 16-22). During the weekend, Puskaric again sexually molested Melanie (*id.* at 68, 73-74, 80-81, 84-85).

In September 1983, Melanie and her parents left Loring and moved to Michigan. Melanie's father was no longer in the Air Force at the time of trial (Tr. 13). On January 17, 1985, the District Attorney for Aroostock County, Maine, advised the Loring AFB authorities that he would defer prosecution of Puskaric to the military.<sup>1</sup>

b. Specification one of the charge alleged that Puskaric molested Melanie Verberg on Loring Air Force Base. Specification two alleged that Puskaric molested Melanie at Caribou, Maine. Before arraignment, Puskaric moved to dismiss specification two on the ground that the offense was not "service connected" under *O'Callahan v. Parker*, 395 U.S. 258 (1969), and therefore could not be prosecuted in a military court (Tr. 11; AX 5). Following a hearing, the trial judge denied the motion and entered find-

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<sup>1</sup> The District Attorney's letter read, in part, as follows (AX 6 (attachment)):

It is further my understanding that the most serious contact with the victim \* \* \* took place on Loring and that the off base conduct was incidental to a relationship overwhelmingly connected to the military community, and that the Air Force has initiated, or intends to initiate, prosecution against Robert T. Puskaric to the fullest exten[t] of military law. Accordingly, I hereby decline civil prosecution and defer the entire matter to your authority.



ings (Tr. 41-42).<sup>2</sup> Puskaric thereafter pleaded guilty to specification one and not guilty to specification two (*id.* at 43-49). Following a bench trial, Puskaric was found guilty on specification two (*id.* at 106).

c. The Air Force Court of Military Review summarily affirmed the findings and sentence without discussing the service-connection issue (Pet. App. 3a-4a). Relying on *United States v. Solorio*, 21 M.J. 251 (C.M.A. 1986), cert. granted, No. 85-1581 (June 16, 1986), the Court of Military Appeals summarily affirmed petitioner Puskaric's conviction for the off-base specification (Pet. App. 1a).

2. Following a general court-martial at Edwards Air Force Base, California, petitioner Jenkins, a member of the United States Air Force, was convicted of carnal knowledge of a minor, sodomy with a minor, wrongful solicitation to commit sodomy, and contributing to the delinquency of a minor, in violation of Articles 120, 125 and 134, UCMJ, 10 U.S.C. 920, 925, and 934. He was sentenced to nine years' confinement, a dishonorable discharge, total forfeiture of pay, and a reduction in rank to the lowest enlisted grade. The convening authority reduced the term of confinement to five years but other-

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<sup>2</sup> The trial judge's findings are reprinted in the petition (at 5-6). He found that the off-base offenses constituted a threat to Loring Air Force Base because the victim was a dependent of a servicemember stationed at the base (Finding No. 12). He also found that the off-base offenses were facilitated by the on-base military relationship among petitioner, his servicemember wife, and the victim's family (Finding No. 15), and that the joint trial of the offenses would promote "[e]conomy of judicial effort" (Finding No. 17).

wise approved the findings and sentence.<sup>3</sup> The Air Force Court of Military Review affirmed the findings and sentence (Pet. App. 5a-6a). The Court of Military Appeals affirmed (*id.* at 2a).

a. Jenkins first met the victim, Lisa Acosta, at the Edwards Air Force Base commissary in late June or early July 1983 while she was shopping with her parents (Tr. 56). Lisa, who was 14 years old, was the dependent daughter of an active duty Air Force staff sergeant stationed and residing at the base (*id.* at 55-57). Between July 15 and 18, 1983, Lisa met Jenkins on base and spoke with him on the telephone on several occasions (*id.* at 57-60). On July 18, Jenkins met Lisa at the Edwards Air Force base bowling alley. After leaving the bowling alley and driving around the base in Jenkins' car, Jenkins and Lisa eventually went to a park about 20 miles from the base with a friend of Lisa's and a friend of Jenkins' (*id.* at 60-62, 144). While he was alone in his car with Lisa, Jenkins asked Lisa to perform fellatio (*id.* at 62). When Lisa refused, Jenkins became quite upset and threatened to hit her (*id.* at 62-63). Jenkins, Lisa, and their friends then drove back to the base (*id.* at 63).<sup>4</sup>

A week later, Jenkins telephoned Lisa at home and asked her out (Tr. 63-64). To conceal the date from Lisa's parents, Jenkins told Lisa to explain to her

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<sup>3</sup> Article 60(c) (2), UCMJ, 10 U.S.C. (& Supp. III) 860 (c) (2), empowers the convening authority to approve, disapprove, commute, or suspend the sentence in whole or in part. The convening authority may not increase the punishment, however. Rule 1107(d) (1), *Manual for Courts-Martial, United States—1984*.

<sup>4</sup> Jenkins' conduct on that evening served as the basis for the specification charging him with solicitation.

mother that she would be babysitting (*id.* at 64). That evening, Jenkins drove Lisa to a park on the base. Jenkins again asked Lisa to perform fellatio (*id.* at 66). Lisa complied, fearing that Jenkins would become angry if she refused (*ibid.*). From the park they drove to another location on the base where Jenkins had Lisa perform fellatio again, and where they engaged in sexual intercourse (*id.* at 68-70).

On September 12, 1984, a Deputy District Attorney for Los Angeles County advised the Edwards Air Force Base authorities that his office would not prosecute Jenkins for the off-base solicitation offense, for two reasons: Jenkins allegedly committed more serious offenses against the same victim on the base, and the two witnesses to the off-base offense were at that time residing in Germany and Arizona, respectively (AX 1).

b. Before arraignment, Jenkins moved to dismiss the solicitation charge on the ground that it occurred off-base and was therefore not "service connect[ed]" (Tr. 144). The trial judge rejected the motion (*id.* at 145). He found that the relationship between Jenkins and his victim was the direct result of their common residence on Edwards Air Force Base; that a majority of the charged crimes occurred on-base; and that principles of judicial economy favored disposing of all the charges in the same forum (*ibid.*).

c. The Air Force Court of Military Review affirmed Jenkins' convictions without discussing the service-connection issue (Pet. App. 5a-6a). Relying on its decision in *United States v. Solorio, supra*, the Court of Military Appeals summarily affirmed Jenkins' conviction for the off-base solicitation offense (Pet. App. 2a).

## DISCUSSION

Petitioners contend that the military courts were not authorized to try them for their off-base crimes because the offenses were not "service connected" under *O'Callahan v. Parker*, 395 U.S. 258 (1969). The question presented in these cases is not materially different from one of the questions in *Solorio v. United States*, cert. granted, No. 85-1581 (June 16, 1986).<sup>5</sup> All three cases involve offenses committed against the minor dependents of fellow servicemembers, all three cases involve on-base and off-base crimes, and all three cases involve a decision by civilian authorities to defer prosecution of the off-base crimes to the military. The petition in this case should therefore be disposed of in light of the Court's decision in *Solorio*.

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<sup>5</sup> The petitioner in *Solorio* also argues that trying him before a court-martial violated the Due Process Clause by denying him fair warning that he was subject to prosecution in the military courts. These cases do not present that question.

**CONCLUSION**

The petition for a writ of certiorari should be held and disposed of as appropriate in light of the Court's resolution of Question One in *Solorio v. United States*, cert. granted, No. 85-1581 (June 16, 1986).

Respectfully submitted.

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FEBRUARY 1987